In The

Supreme Court of the United States

October Term, 1978

No. 77-1722

LAWRENCE DALIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petition for Certiorari Filed June 2, 1978 Certiorari Granted October 2, 1978

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

United States Constitution Cited:

Contents

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OPINIONS BELOW

The Court of Appeals for the Third Circuit filed an opinion on May 3, 1978. That opinion appears in the appendix to the petition for writ of certiorari filed in this cause. The opinion of the Third Circuit is officially reported as *United States v. Dalia,* 575 F. 2d 1345. The opinion of the United States District Court for the District of New Jersey was filed on January 11, 1977 and also appears in the appendix to the petition for writ of certiorari. The trial court opinion is officially reported as *United States v. Dalia,* 426 F. Supp. 862.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 3, 1978. A petition for writ of certiorari was timely filed with the United States Supreme Court and granted on October 2, 1978. Jurisdiction of the United States Supreme Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

QUESTION PRESENTED

May government agents commit an otherwise illegal breaking and entry in order to install, maintain and remove electronic listening devices when lawful authority to intercept oral communications has been granted pursuant to 18 U.S.C. §2510 *et seq.*, but when no authority to commit a breaking and entry has been sought or obtained and the supervising court has not been advised of the manner of the proposed entry of installation?

STATEMENT OF THE CASE

Petitioner Lawrence Dalia was indicted on November 6, 1975 with a co-defendant, Daniel Rizzo, in a five count indictment.

Count One charged the defendants with conspiring with five other persons to transport and possess goods stolen in interstate commerce in March, 1973. The statutory reference was to the general conspiracy charge found in 18 U.S.C. §371. Count Two charged the two named defendants and the five unnamed co-conspirators with robbing an interstate truck shipment in violation of 18 U.S.C. §2 and §1951. Count Three charged the two named defendants and four of the previously unindicted co-conspirators with transporting stolen goods in interstate commerce in violation of 18 U.S.C. §2 and §2314. Count Four again charged the two defendants and the five previously named unindicted co-conspirators with receiving goods which had been stolen while engaged in interstate commerce in violation of 18 U.S.C. §2 and §2315. The last count charged both defendants and the other five individuals with possessing goods which had been stolen in interstate commerce in violation of 18 U.S.C. §659.

Immediately prior to commencement of trial, the co-defendant Daniel Rizzo, entered a plea of guilty. The five persons named in the indictment as unindicted co-conspirators had previously been prosecuted for their involvement in the alleged criminal transaction and had all pleaded guilty approximately two years before petitioner's trial.

Petitioner's trial was held in the District of New Jersey before Honorable Frederick B. Lacey, J.D.C. on June 15, 16, 17 and 18, 1976. The trial judge granted a motion for judgment of acquittal on Counts Two and Three at the conclusion of the Government's case (R4.131). Extensive redaction of the indictment was accomplished to comport with trial proofs and consequent rulings. On June 18, 1976, the jury returned a verdict of guilty on Counts One and Four. The jury acquitted petitioner on possessory Count Five.

Extensive electronic surveillance had preceded the indictment and appropriate motions to suppress had been made. However, the court determined to decide these motions at the

conclusion of the trial. Consequently, post-trial evidentiary hearings were conducted resulting in the denial of petitioner's motions. On January 24, 1977, petitioner was sentenced to a term of imprisonment of five years on Count One. Another five year sentence was imposed on Count Four to run concurrently with the term sentence imposed on Count One.

As a result of pre-trial discovery and evidence adduced at post-trial hearings, it was developed that on March 14, 1973, Judge Lacey had issued an order authorizing the interception of wire communication emanating from petitioner's business premises in Linden, New Jersey. The order provided that two separate telephones were to be the subject of the interception.

After the two telephones had been tapped for 20 days, the Government applied again to Judge Lacey for an order permitting continued electronic surveillance. This time, however, the Government sought and was granted the right to intercept both telephone conversations, as well as oral communications. This second order was granted on April 5, 1973 and recited the same two telephones which had been subjected previously to interception. The order also found,

> "(e) There is probable cause to believe that the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the northwesterly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey, has been used, and is being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses." (A7).

The order then provided that the previously mentioned telephones could be intercepted again. The order went on to state that the Government could,

> "(b) Intercept oral communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia . . ." (A8).

This order, as was the first, was a 20-day order. It provided that New Jersey Bell Telephone Company should offer whatever assistance was necessary to provide for the interception of the wire communications, however, it made no provision for the manner in which oral communications were to be intercepted.

In accordance with the authorization of the foregoing order, the two business telephones of petitioner were tapped for another 20 days. Additionally, for 20 days his office was "bugged" and all conversations taking place therein were recorded.

Upon the expiration of the second order, the Government again applied to Judge Lacey to continue its eavesdropping. On April 27, 1973, Judge Lacey authorized interception of wire and oral communications in a manner identical to that which had been done on April 5, 1973. This third order again was for 20 days. It applied to the same two telephones and to oral communications emanating from petitioner's office. Pursuant to that order, the Government intercepted all telephone communications from the two business telephones for an additional 20 days and all conversations conducted in petitioner's office for an additional 20 days (A11-15).

When the indictment came on for trial before Judge Lacey on June 15, 1976, the court first alluded to petitioner's pending motion to suppress evidence based upon the method of electronic surveillance. The court requested counsel to set out their respective positions and then asked the Government attorney whether he had instructed the law enforcement officers as to how they were to effectuate the order authorizing interception of oral communications. The relevant passage is instructive:

"THE COURT: . . . was there any discussion between you and the agent on the one hand and me on the other as to how this order was going to be carried out?

MR. DEICHERT: No.

THE COURT: All right. That was one question that you wanted asked.

MR. RUPRECHT: That's correct Your Honor.

THE COURT: Now, before we get into the affidavits — and I'll deal with that in a moment — I think your record also ought to reflect you have raised this as another issue. I think your record also reflected a response to that issue.

My recollection, again, is that I gave no limiting instructions on how my order was to be carried out.

MR. DEICHERT: That's correct.

THE COURT: And my recollection further is that I did not explore afterwards how my order was carried out. Is that correct? In terms of how the entry was made.

MR. DEICHERT: Yes, that's correct as well." (A21-22).

At trial, the Government introduced several tape recordings of intercepted telephone conversations as well as eight separate tape recorded office conversations which had been overheard by the electronic listening device installed pursuant to the second and third orders.

On July 29, 1976, the court directed counsel to appear for a post-trial hearing on petitioner's pending motions to suppress evidence. Petitioner had filed an affidavit (A45) establishing his belief that any electronic surveillance in his office might have resulted from a break and entry. The Government had three FBI agents in court who had apparently participated in the break-in to install listening devices. Agent Neil E. Price was called by the Government as its first witness. He said he had made an entry through a side window of petitioner's place of business on April 5, 1973. He said that he did this in order to install a listening device in the ceiling of petitioner's office. While on the premises, he denied taking anything or speaking to anyone about anything he had seen present inside the premises. He admitted to reentering the building on May 16, 1973 to remove the installed device. He said that three agents entered the building on April 5, 1973 and two entered on May 16, 1973 (A29-42).

On cross-examination, Agent Price testified he did not prepare any reports dealing with his activities, but the court would not permit him to answer why reports had not been made. The court would not permit interrogation as to what position Agent Price's superior held who directed the break-in (A34). The agent testified that no one gave him any instruction whatsoever as to the method or manner of performing his task. He said that he did not prepare any documents for submission to the court dealing with the break-in. He admitted there had been no briefing sessions or instructions by any members of the Department of Justice or United States Attorney's Office respecting the manner in which they should conduct themselves while on the premises (A35).

While on the premises, the agent said he looked throughout petitioner's entire building for "safety" reasons. He testified that he was in petitioner's office building for two or three hours and in petitioner's personal office "maybe a half an hour total." (A37, 39).

The court indicated it considered the factual issues to be extremely narrow and continually restricted the cross-examination of Agent Price. At the conclusion of the agent's testimony, the court inquired of the Government attorney whether the other two FBI agents who were on hand, "if called, would testify substantially, at least, as this agent has." Upon the Government attorney's representation that they would, the court said, "I'm not going to then permit the calling of the other agents." (A43).

At the conclusion of the hearing, the court reminded counsel that "the method of breaking . . . was not brought to my attention." (A43).

Defense counsel then noted that petitioner would take the stand to testify that there were several "breaks and entry during the period of time that we are concerned with and specifically a break-in that occurred the night before the alleged removal of the — ." (A43). The Government attorney agreed that this was already in the case through affidavit proof and he did not wish to cross-examine on it, therefore, no further testimony was adduced (A44).

SUMMARY OF ARGUMENT

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2510-§2520 does not authorize a court to permit law enforcement officers to commit otherwise illegal breakings and entries in order to install electronic listening devices. The legislative history of the act fails to reveal such an intention. It is not unduly weakening the tools of law enforcement officers to refuse them the right to commit surreptitious entries without explicit legislative approval.

In the event it is found that the Third Circuit correctly interpreted Title III, then such an interpretation is violative of the Fourth Amendment of the United States Constitution. A

statute which permits law enforcement officers to conduct breakings and entries is unconstitutional because such an activity is necessarily unreasonable.

If it is assumed that Title III may constitutionally be interpreted as authorizing a court to empower law enforcement officers to break and enter in order to install listening devices, then the order and search in this case were violative of the Fourth Amendment. The order was overbroad in failing to give any direction to the law enforcement officers. Too much discretion was given to the officers in conducting their search and no independent hearing and order existed dealing with the specific breakings and entries which were conducted.

ARGUMENT

I.

A court has no statutory power to permit a breaking and entry in order to install electronic eavesdropping devices nor is a lawful order authorizing interception of oral communications an implicit authorization to commit a break-in.

Since 1976 several cases have considered whether federal agents may conduct surreptitious entries to install, maintain, position or remove electronic listening devices pursuant to a Title III[1] order. The decisions are in hopeless disarray with no common thread of reasoning in their fabric. A brief review of the cases is necessary to place the issue in proper perspective.

The first case discussing the issue was *United States v. Agrusa*, 541 F. 2d 690 (8 Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). There,

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1. "Title III" refers to Title III of the Omnibus Control and Safe Streets Act of 1968, 18 U.S.C. §2510, *et seq.*

> "The order authorized the Government 'to make secret and, if necessary, forcible entry any time of day or night which is least likely to jeopardize the security of this investigation, upon the premises . . . in order to install and subsequently remove whatever electronic equipment is necessary to conduct the interception of oral communications in the business office of said premises.'" 541 F. 2d at 693.

Upon appeal, the Eighth Circuit held that such an order and entry was not violative of the Fourth Amendment. The court then apparently assumed statutory authority of the court to permit a breaking and entry; not by reading it implicitly into Title III but by referring to 18 U.S.C.§3109[2] as a codification of a law enforcement officer's common law right to enter under exigent circumstances. The court stressed that the premises was an unoccupied commercial building in holding that sufficient exigent circumstances existed. The analysis concluded by stating:

> "We hold that law enforcement officials may, pursuant to express court authorization to do so, forcibly and without knock or announcement break and enter business premises which are vacant at the time of entry in order to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based on probable cause and otherwise in compliance with Title III. We

2. 18 U.S.C. §3109 reads:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

> express no view on the result which obtains when one or more of these factual variants is altered." 541 F. 2d at 701.

There was a strong dissent from Circuit Judge Lay who noted that the exigencies sufficient to permit a breaking and entry had not been demonstrated. He then noted that, presumably on Fourth Amendment grounds, he would reverse because,

> "[r]ather then draw artificial distinctions, I would hold searches such as this to be unreasonable *per se*." 541 F. 2d at 704.

Thereafter the Eighth Circuit was petitioned to rehear the matter, *en banc*. By an evenly divided vote, the petition was denied, however, the four voting for rehearing expressed "grave doubts" on constitutional grounds that *any* order authorizing a break and entry would be valid and,

> ". . . we believe that the Fourth Amendment does not permit government agents to break into and enter private property to spy out evidence which might develop in the future by planting an electronic bug in such premises." *United States v. Agrusa, supra, en banc*, 541 F. 2d 704.

The second case was *United States v. Ford*, 414 F. Supp. 879 (D.D.C. 1976), *aff'd*, 553 F. 2d 146 (D.C. Cir. 1977). There, federal agents secured an order to electronically surveil commercial premises.[3] The agents informed the issuing court that they intended to gain entry to install a listening device by evacuating the building through a bomb scare. The court, in its order, permited the agents to,

3. The interception and electronic surveillance was conducted pursuant to 23 D.C. Code §§541-556 (1973) which is practically identical to Title III.

> "Enter and re-enter . . . for the purpose of installing, maintaining and removing the electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry or entry and re-entry by ruse and stratagem." 553 F. 2d at 149.

The circuit court held that,

> "When police seek to invade, surreptitiously and without consent, a protected premises to install, maintain or remove electronic surveillance devices, prior judicial authorization in the form of a valid warrant authorizing that invasion must be obtained." 553 F. 2d at 165.

The district court had concluded that while Title III did not expressly empower officers to break and enter, the Legislature had intended this result. *United States v. Ford*, 414 F. Supp. at 883. The circuit court dealt entirely with Fourth Amendment considerations in striking down the court order as facially overbroad. It did not resolve the issues of whether Title III *in fact* permitted break-ins[4] or whether a break-in could *ever* withstand constitutional challenge.[5]

4. "Though we need not reach in this case the issue whether covert entry may be authorized by a court order, we note that the statutory provisions could be read to apply only to the kind of devices which are technically trespassory under the doctrine of *Silverman v. United States*, 365 U.S. 505 (1961), but do not require covert or surreptitious entry for installation." 553 F. 2d at 151, footnote 20.

5. "We do not decide when, if ever, surreptitious entries are reasonable within the Fourth Amendment . . . . If police are to be permitted to enter private premises to conceal eavesdropping devices — a question we leave unresolved — they at least must be required to proceed in accordance with the authorization of a warrant narrowly tailored to the demonstrated demands of the situation." 553 F. 2d at 170.

In *Application of the United States*, 563 F. 2d 637 (4 Cir. 1977) the circuit court overturned a district court which had subjected an application for surreptitious entry to a scrutiny which demanded the Government show a "paramount interest" before authorizing such manner of entry. It was held by the Fourth Circuit that Title III contemplated surreptitious entries but the supervising judge had to make independent findings of need to satisfy the Fourth Amendment. The court stated:

> "[p]ermission to surreptitiously enter private premises cannot, therefore, be implied from a valid Title III order sanctioning only the interception of oral communications." 563 F. 2d at 644.

The overseeing court had to sanction, "such an entry in a manner that does not offend the substantive commands of the Fourth Amendment." *Ibid.*

There next followed two cases which stand for the proposition that Title III implicitly empowers law enforcement officers to conduct discretionary breakings and entries if armed with an order authorizing interception of oral communications. In *United States v. Scafidi*, 564 F. 2d 633 (2 Cir. 1977), *cert. denied sub. nom., Vigorito v. United States*, 435 U.S. 903 (1978) the court held that an order authorizing electronic surveillance carries,

> ". . . its own authority to make reasonable entry as may be necessary to effect the seizure of the conversation." 564 F. 2d at 640.

The case at bar was decided by the Third Circuit in a brief opinion [*United States v. Dalia*, 575 F. 2d 1344 (3 Cir. 1978)], which relied primarily upon *United States v. Scafidi, supra*, and the district court opinion in *Dalia*. The holding was summarized in the following fashion:

> "We agree with Judge Lacey that an order authorizing the interception of oral communications does not require explicit authorization for a forcible surreptitious entry and we affirm." 575 F. 2d at 1345.

Within recent weeks, two more circuits have dealt with the issue presented here. In *United States v. Finazzo*, ____ F. 2d ____ (6 Cir. decided August 28, 1978), the court refused to accept the premise that Title III authorized breakings and entries:

> "In some circumstances, the installation of an electronic bug may not be possible without a forcible breaking and entering of the suspect's premises, but that does not imply that the power to break and enter is subsumed in the warrant to seize the words. The breaking and entering aggravates the search, and it intrudes upon property and privacy interests not weighed in the statutory scheme. Interests which have independent social value unrelated to confidential speech. We are not inclined to give the Government the right by implication to intrude upon these interests by conducting official break-ins, especially when the purpose is secretly to monitor and record private conversations, a dangerous power, otherwise carefully limited and defined by statute." (Slip opinion at 9.)

Even more recently, the Ninth Circuit came to a similar conclusion in *United States v. Santora*, ____ F. 2d ____ (9 Cir. decided October 6, 1978). In an exhaustive study of pertinent legislative history (slip opinion at 8-18) Judge Hufstedler concluded:

> "We agree with the Government that Congress 'was aware of the entry problem.' But we disagree that from that awareness Congress chose to grant authority to permit either break-ins or technical trespasses to install bugging devices by implications derived from its silence." (Slip opinion at 15.)

The threshold question, then, that must be addressed on this appeal is whether there exists statutory authority in Title III to permit a breaking and entry to install listening devices. If none exists, then the interception of petitioner's office conversations was clearly unlawful. Since the overseeing judge was not apprised of the Government's intentions and never specifically authorized the entries, it is unnecessary to consider the argument of the Government, made and rejected in *United States v. Finazzo, supra,*

> "... that federal judges have inherent or common law power under the Fourth Amendment, independent of any statutory authority, to permit break-ins in the execution of an otherwise valid eavesdrop warrant." (Slip opinion at 10.)

Further, since the Government, in its brief below, did not argue that law enforcement officers had an inherent power to break and enter, nor did the district court or Third Circuit so hold, petitioner respectfully expresses his intention to answer such an argument, if made, by way of reply brief.[6]

When the Omnibus Crime Control and Safe Streets Act of 1968 was enacted containing Title III dealing with wiretapping

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6. The only case in which this argument has been made by the Government is *United States v. Finazzo, supra,* at slip opinion pp. 16-22. The majority in *United States v. Agrusa, supra,* stated that it based its affirmance upon the warrant issued by the district court to conduct a surreptitious entry but did not discuss the source of the court's power to issue the warrant.

and electronic surveillance, the Act set out a detailed procedure under which law enforcement officers could, in a most limited fashion, wiretap and conduct electronic surveillance. Title III has been referred to as a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46 (1972).

Various portions of Title III regulate the circumstances for which an order permitting wiretapping and electronic surveillance may be resorted. Only specified crimes may be the subject of electronic surveillance. 18 U.S.C. §2516(1)(a) to (g). The prosecutorial decision to apply for an order permitting wiretapping or electronic surveillance must come from the highest levels of the Department of Justice. 18 U.S.C. §2516(1). There are provisions for minimization of the number and extent of overheard conversations and the interception must end upon the achievement of its objective but in no case beyond 30 days. 18 U.S.C. §2518(5). Electronic surveillance may not be utilized unless the Government is able to show that conventional investigatory methods are inappropriate. 18 U.S.C. §2518(1)(c). Not only must a substantial showing of probable cause be made that incriminatory information will be forthcoming but the suspected individuals must be identified as well as a description of the type of communications which are sought to be intercepted. 18 U.S.C. §2518(1)(b). There are detailed requirements with respect to inventorying and sealing the results of the interceptions as well as notification to the subjects. 18 U.S.C. §2518(8)(a) to (d). The matter has been considered so sensitive that judges are obliged to file reports with the Administrative Office of the United States Courts of all important details with respect to applications and orders for electronic surveillance. 18 U.S.C. §2519(1). Further, in the first month of each year, high officials of the Department of Justice are obliged to report to the Administrative Office of the United States Courts with respect to their utilization of Title III. 18 U.S.C. §2519(2).

It is noteworthy that at the time Title III was enacted, the Congress inserted certain findings into the body of the statute. 18 U.S.C. §801(d) provides that:

> "To safeguard the privacy of innocent persons, the interception of all wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court."

The foregoing recitation serves as a reminder of the care the Congress gave to the enactment of a statute which carries with it an inherent capacity for abuse. Despite the required detailed overseeing of law enforcement officers by the courts when Title III is resorted to as a investigative tool, there is absolutely nothing in the Act which authorizes government agents to conduct otherwise illegal breakings and entries to effectuate its purpose. Nowhere in Title III may there be found authorization for a court to permit an otherwise illegal breaking and entry.

The Third Circuit in its opinion below found that despite the silence of Title III on the issue, there is implicit authorization for surreptitious entries. However, given the extensive protections afforded by Title III, it is inconceivable that legislative authority to commit otherwise illegal breakings and entries may be found simply because there is authority to eavesdrop on conversations.

The legislative history so carefully detailed in *United States v. Santora, supra*, shows there is very little that can be said to imply a legislative intent to authorize breakings and entries. Congress was presumptively aware of *Silverman v. United States*, 365 U.S. 505 (1961). There it had been held that a

trespassory eavesdropping violated the Fourth Amendment to the Constitution. One could hardly conceive that *Silverman*, was "overruled" by Title III through implication.

The argument presented by the Fourth Circuit in support of its holding in *Application of the United States, supra,* was that authority to break and enter must be implied lest criminals find a "loophole" in the law. This argument is founded upon the supposition that electronic surveillance may be conducted only by wiretapping or breakings and entries. However, it is quite possible for electronic surveillance to take place without a breaking and entry. In *Silverman v. United States, supra,* the electronic surveillance was trespassory but not the product of a breaking and entry. There, a spike microphone was driven through a wall into a heating duct enabling law enforcement officers to pick up conversations from an adjoining apartment. In *Goldman v. United States,* 316 U.S. 129 (1942) electronic surveillance was accomplished by placing a "detectophone" against a wall. Many other forms of electronic surveillance, not necessitating breakings and entries, can be contemplated. For example, parabolic microphones pick up conversations at great distances. Informants, lawfully upon the premises, can secrete transmittors or leave tape recorders behind. Consequently, it does not follow as a matter of logical necessity that the Legislature's permission to conduct electronic surveillance also implies its permission to commit breakings and entries. The far more likely explanation for the absence of any explicit authorization in Title III is that there was no consensus to permit breakings and entries. The utter absence of any legislative history that can be pointed to indicating a conscious decision to permit surreptitious entries is powerful evidence that Congress did not intend to confer such authority upon law enforcement officers or the courts. Certainly an issue with such enormous public interest and political consequences would have been the subject of specific debate had it been the intent to confer such authority through Title III. It does not do an injustice to Title

III or the Congress, nor does it create an intolerable burden upon law enforcement officers to interpret Title III as not an authorization to break and enter in order to effect electronic surveillance.

II.

It is a violation of the Fourth Amendment to permit law enforcement officers to conduct surreptitious entries under the authority of Title III.

If it should be found that Title III, by implication, authorizes a court to permit law enforcement officers to commit breakings and entries, then petitioner urges that such an interpretation is violative of the Fourth Amendment to the United States Constitution.

In referring to trespassory intrusions to effect electronic surveillance, it was held in *Silverman v. United States,* 365 U.S. 505, 509-51 (1961),

> "Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights."

In *Irvine v. California,* 347 U.S. 128 (1954), police officers broke into the petitioner's home to install and reposition eavesdropping devices. The plurality opinion read in pertinent part,

> "Each of these repeated entries of petitioner's home without a search warrant or other process was a trespass, and probably a burglary, for which any unofficial person should be, and

> probably would be, severely punished. . . . That officers of the law would break and enter a home, secrete such a device, even in a bedroom and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principle declared by the Fourth Amendment."

As previously noted in Point I, *United States v. Ford, supra, United States v. Santora, supra,* and an equally divided panel in *United States v. Agrusa, supra,* mention the troublesome Fourth Amendment problem without expressly ruling upon it. Further, in *United States v. Finazzo, supra,* the Sixth Circuit, after deciding the case on statutory grounds, added,

> "We need not decide whether we agree with the four members of the Eighth Circuit *en banc* court who would hold that break-ins to install eavesdrop devices violate the Fourth Amendment under all circumstances, even if author zed by statute. We need not decide whether such a statute would be constitutional."

The Fourth Amendment protects against unreasonable searches and seizures. It is respectfully submitted that legislative authority for law enforcement officers to commit otherwise illegal breakings and entries into the home or office of a suspect is inherently unreasonable. In *Ker v. California,* 374 U.S. 23 (1963), local officers utilized a passkey to gain entry into the home of Ker who was suspected of possessing narcotics. Ker was arrested on the premises and the officers conducted a search incident to that arrest. Narcotics were found on the premises in the search and were introduced against Ker at trial. A sharply

divided court upheld the conviction on the basis that exigent circumstances justified the officers' failure to give notice of their intention to enter. A state statute existed authorizing an unannounced entry where exigent circumstances such as the imminent destruction of evidence existed. The majority held:

> "Here, justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief he might well have been expecting the police. We therefore hold that in the particular circumstances of this case, the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment."

An analysis which finds the Fourth Amendment not violated by the circumstances in *Ker* might well find a violation where officers are authorized to commit what would otherwise be considered a breaking and entry. The circumstances of this case are more aggravated than in *Ker.* Here, law enforcement officers, according to the Third Circuit, are permitted to enter into a suspect's premises and wander about for "safety" reasons. The officers are permitted to stay on the premises for an indefinite period of time, presumably in their own discretion, to do whatever they believe is necessary to effect electronic surveillance. The number of entries, the time, the number of persons authorized to go upon the premises all are within the discretion of the law enforcement officers.

The majority in *Ker v. California, supra,* went on to state:

> "Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its

> recognition of individual freedom. That safeguard has been declared to be 'as of the very essence of constitutional liberty' the guarantee of which 'is as important and imperative as are the guarantees of the other fundamental rights of the individual citizen. . . .' While the language of the amendment is 'general', it forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made."

The four members joining in the opinion to affirm *Ker,* found that the exigent circumstances surrounding the arrest and entry made the consequent search not unreasonable. However, the four dissenters in *Ker* held that an unannounced police intrusion into a private home is violative of the Fourth Amendment,

> "[e]xcept (1) where the persons within already know of the officer's authority and purpose or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock on the door) are then engaged in an activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted." 374 U.S. at 47.

The opinion of the Ninth Circuit in *United States v. Santora, supra,* demonstrates the awareness of the Congress which enacted Title III of the leading cases of *Berger v. New York,* 388 U.S. 41 (1967) and *Katz v. United States,* 389 U.S. 347 (1967). In fact, Title III was, in large measure, a careful response to the *Berger* and *Katz* holdings. *See, United States v. United States District Court,* 407 U.S. 297, 307 (1972). Thus, it is not unreasonable to look to these cases as an interpretation of

Title III and also to refer to them to see if the Third Circuit's interpretation of Title III squares with their holdings.

In *Berger v. New York, supra,* a New York statute authorizing electronic surveillance resulted in the placement of a listening device in the office of one Neyer. On appeal to the United States Supreme Court, the New York statute was found unconstitutional because in the words of the *Berger* court, it

> ". . . permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent changes, than that required when conventional procedures of search and seizure are utilized. . . . In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." 388 U.S. at 60.

According to *Berger,* the barest minimum constitutionally, would be a statutory requirement of exigency. Title III has none. But petitioner's argument goes even further. Few things are more susceptible to abuse than that which the Government seeks to legitimatize in the instant case. One can conceive of few activities by the police more repugnant than the breaking into private premises by law enforcement officers as if common burglars and the consequent unsupervised rummaging around to install, maintain, reposition and remove listening devices.

It is especially interesting to note that in the instant case the officers who entered petitioner's premises pursuant to an order of electronic surveillance did so when they never could have got in with a search warrant. There was nothing in the various government applications for electronic surveillance that would indicate petitioner had any contraband or incriminatory evidence that might be seized under a search warrant. Thus, the intolerable situation arises where officers who could not obtain a

valid search warrant can manage to come upon a suspect's premises, in a totally secret and unsupervised manner, conduct a search for "safety" reasons and then depart. Surely a statute which countenances this activity is violative of the Fourth Amendment prohibiting unreasonable searches.

If the public is to have confidence in its law enforcement officers, they must conduct themselves in a manner which is beyond reproach. While the examination of the one entering officer was unsatisfactory because of the restrictions imposed, his unusual nighttime activities raise numerous questions. The petitioner filed an affidavit and accompanied it with a police report (A47), showing that during the two months he was being subjected to electronic surveillance, his business was entered on numerous occasions. One documented instance was the night after the FBI agent admitted entering the premises. Whether law enforcement officers were responsible for the May 16, 1973 break-in may never be known. However, unnecessary questions and unnecessary suspicions are raised. Confidence in the probity of law enforcement officers demands that they be held to higher standards than permitted by the Third Circuit's interpretation of Title III. The conduct which the Third Circuit permits law enforcement officers to engage in pursuant to Title III is fundamentally unreasonable. It is this unreasonableness which raises the objection to the constitutional level.

III.

Assuming the right of a court to authorize a surreptitious entry to install a listening device pursuant to Title III, such authority was neither applied for, considered nor given and the consequent entry of the law enforcement officers to install listening devices was unlawful.

The warrant in the instant case simply authorized law enforcement officers to intercept conversations in petitioner's office. The Government concedes that the issuing judge was never apprised of the intention of the officers to enter petitioner's premises. If it is assumed that Title III implicitly authorizes surreptitious entry to install listening devices, then the Fourth Amendment requires that such an entry be the specific subject of judicial authorization. In *United States v. Ford, supra,* the court was concerned with an order specifically authorizing officers to break and enter in order to install a listening device. The District of Columbia Circuit Court of Appeals held that the warrant was overbroad. It was the holding of that court that under well-established case law dealing with search and seizure, a warrant must be particular and specific if it is to withstand constitutional attack. Among the failures in that case was the absence of any direction as to the manner in which the entry was to take place, the persons who were to make the entries, the number of entries that would be authorized or the length of time the officers would be permitted to remain on the premises. The court stated,

> "A person whose physical privacy is to be invaded has a right to expect the judicial officer issuing an intercept order will authorize only those entries and those means of entry necessary to satisfy the demonstrative and cognizable needs of the applicant. This is the method by which the magistrate exercises the degree of supervision required by the Fourth Amendment in the

> absence of statutory safeguards. There having been a failure in this regard, we affirm the judgment of the District Court that, given the showing to the District Judge in this case, the failure of the order to limit time, manner or number of entries over a 40-day period made the authorization far too sweeping." (Footnotes omitted) 553 F. 2d at 170.

In the instant case, there was no prior decision by a neutral and detached magistrate that a breaking and entry was required in this case. In *Application of the United States, supra* at 644, the court held that:

> "Permission to surreptitiously enter private premises cannot, therefore, be implied from a valid Title III order sanctioning only the interception of oral communications. . . . With respect to the instant case, this means that even had the district court issued an order of authorization on the basis of its preliminary conclusion that the statute permitted interception of the target conversations, the door would not have been automatically opened for the Government to plant listening devices in the manner proposed.

The district court was thus correct insofar as it subjected the request for authorization and surreptitious entry to separate Fourth Amendment consideration. Since in the absence of exigent circumstances the Fourth Amendment commands compliance with the warrant requirement, we would normally countenance secret entry by federal agents for the purpose of installing, maintaining or removing listening devices only under the following conditions: (1)

> where, as here, the district judge to whom the interception application is made, is apprised of the planned entry; (2) the judge finds, as he did here, that the use of the device in the surreptitious entry incident to its installation and use provides the only effective means available to the Government to conduct its investigation; and (3) only where the judge specifically sanctions such an entry in a manner that does not offend the substantive commands of the Fourth Amendment. Such a requirement is not novel to the law of search and seizure. It also comports with the interception scheme of Title III, since it is apparent that the legislature anticipated meticulous judicial supervision of all aspects of electronic eavesdropping."

Title III is unusual in that the Congress saw fit to insert detailed findings prior to the text of the statute. Among these findings was the following:

> "(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction *and should remain under the control and supervision of the authorizing court.*" (Emphasis supplied.) 18 U.S.C. §801(d).

The control is not only mandated by statute. This control is of constitutional import as *United States v. Ford, supra,* and *Application of the United States, supra,* both show. The control comes about by having the court exercise its independent judgment as to the need for surreptitious entry only after that need has been established under oath. The control is furthered by requiring a particularized warrant directing the officers as to exactly what it is they may do.

In addition to the constitutional and statutory demands that exist to control police officers when engaged in a sensitive invasion of the peoples' rights, there is a control to be exercised by the courts as part of their general supervisory duties over police practices. For example in *Osborn v. United States,* 385 U.S. 323 (1966) law enforcement officers wished to record an anticipated conversation with a suspect believed to be involved with jury tampering. Application was made to the court for specific authorization and after hearing the application and being satisfied of the need, the court did give specific authority to conduct the surveillance. No statute was involved, the case having preceded Title III. In any event, such consentual "overhearing" would not qualify as a "interception" under Title III. Notwithstanding the absence of any statute which would make the proposed surveillance illegal, the district court, as well as the Supreme Court approved the procedure of judicial supervision over such activities.

In dealing with surreptitious entries to install listening devices, the courts are dealing with perhaps the most sensitive area in which law enforcement officers intrude into the life of the public. It is essential that such a grave intrusion so susceptible to abuse be subjected to the most stringent controls. These controls must not be simply minimal constitutional controls dictated by the Fourth Amendment. They should be controls tailored by the courts to meet the specific problem at hand. It is urged that if surreptitious entries are to be countenanced, they be permitted only upon the closest judicial supervision.

The failure of the Government to apprise the supervising court that a break-in was anticipated invalidates the fruits of that unlawful entry. In the case at bar, there was never even an evaluation by "the neutral and detached magistrate" as to the need for surreptitious entry. At no time was there ever any question put to the Government as to its supposed need to conduct a breaking and entry. Never was inquiry made as to why a less intrusive form of surveillance could not have

accomplished the same end. Furthermore, once the agents received their authorization to intercept oral communications, they were left with absolutely no restrictions on how many times they might enter petitioner's premises. There is no way of knowing whether the agents were of the belief that once they were "lawfully" on the premises, they were thereby entitled to conduct a full-scale search. No one had briefed them on their rights, duties or obligations while on petitioner's premises. The total absence of judicial participation and control over this sensitive area demands suppression of the results of the unlawful entry.

CONCLUSION

For the reasons expressed above, it is respectfully urged that the admission into evidence of seven conversations which were the product of an unlawful entry was error. Consequently, the conviction of petitioner should be reversed and the matter remanded to the trial court for a new trial.

Respectfully submitted,

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